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Reflections on the Establishment of the Chinese Air Identification Zone

by Yinan Bao

Introduction

The official announcement of the establishment of the East China Sea Air Defence Identification Zone¹ and the announcement of the Aircraft Identification Rules for the East China Sea Air Defence Identification Zone² by China in late November 2013 have caused considerable sensation as well as controversy in the international community. Generally speaking, under contemporary international law, there is no concrete treaty law governing the legal status of ADIZ. In fact, legal rules governing the establishment and operation of an ADIZ are mostly regulated by customary international law. The lack of an international treaty regime of the ADIZ and the relative flexibility of the customary international law inevitably lead to the current controversy on the establishment and operation of the Chinese ADIZ.

In this short article, the author will make comments on three questions related to the establishment and operation of the Chinese ADIZ: What is the legal status of ADIZ in contemporary international law? Whether the establishment of the Chinese ADIZ conforms to the contemporary customary international law? Whether the Chinese aircraft identification rules conform to the customary international law? The author will argue that the establishment of the Chinese ADIZ and the Chinese aircraft identification rules do not contravene customary international law. Even though some specific aircraft identification rules announced by China do not entirely accord with the current State practice, customary international law does not prohibit these rules. Moreover, the legality of these rules is also enhanced by the increasing recognition by other States.

i. The Legal Status of ADIZ in Contemporary International Law

According to one authoritative work on public international law, an Air Defence Identification Zone (ADIZ) can be defined as:

a defined area of airspace within which civil aircraft are required to identify themselves. These zones are established above the exclusive economic zone ('EEZ') or high seas adjacent to the coast, and over the territorial sea, internal waters, and land territory. ... An aircraft approaching national airspace can be required to identify itself while seaward thereof in international airspace as a condition of entry approval.³

¹ The official announcement was issued by the Ministry of National Defence of the People's Republic of China on 23 November 2013. See 'Statement by the Government of the People's Republic of China on Establishing the East China Sea Air Defense Identification Zone' (*Xinhua News*, 23 November 2013) http://news.xinhuanet.com/english/china/2013-11/23/c_132911635.htm accessed 2 December 2013. Referred to as 'Chinese ADIZ' in the following text.

² See 'Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C.' (Ministry of National Defense of the People's Republic of China, 23 November 2013) http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm accessed 2 December 2013. Referred to as 'Chinese aircraft identification rules' in the following text.

³ JA Roach, 'Air Defence Identification Zones' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (2nd edn, OUP 2012) Vol I, 231, para 1. A similar definition has been proposed by Abeyratne.

Three important points can be inferred from the above definition of the ADIZ. In the first place, the function of the ADIZ is to be served as a buffer area for identifying those foreign aircrafts that approach the national airspace of a coastal State. Accordingly, the purpose of establishing an ADIZ is to provide precautionary measures for the protection of territorial sovereignty over national airspace of a State, as well as its national security.⁴ Secondly, though the definition seems to suggest that an ADIZ can be established over marine space as well as land territory, in fact, an ADIZ will be inconceivable without covering the relevant marine space adjacent to a coastal State (such as the internal waters, territorial sea, EEZ of that coastal State) or the high seas. It is worth noting that State practice also reveals that the ADIZ is exclusively established by coastal States only. By far, no land-locked State has ever claimed an ADIZ. This very fact suggests that the relevant marine space of a coastal State are essential to the establishment and operation of an ADIZ. In the following analysis it can be revealed that States that have territorial disputes over marine space may also have disputes over their respective ADIZ. The third point is that an ADIZ is generally established and expanded outside the territorial airspace. As a result, the rights and duties of an aircraft that flies into this defined portion of international airspace may be affected by the establishment of the ADIZ.⁵

As of today, there is no international treaty regime governing the establishment and operation of the ADIZ. Thus, international law concerning the ADIZ is largely, if not exclusively governed by customary international law.⁶ Arguably, the legal basis of establishing an ADIZ can be found in Article 11 of the Convention on International Civil Aviation 1944 (the Chicago Convention)⁷ where it expressly endorses the right of a State to establish laws and regulations relating to 'the admission to or departure from its territory of aircraft engaged in international air navigation'. It has been asserted by scholars that the ADIZ is the product of such kind of laws and regulations under Article 11. The justification for establishing an ADIZ outside the national airspace of a State is elaborated by Abeyratne. According to Abeyratne:

ADIZs requirements act as conditions precedent that are calculated to ensure the protection of that State. The justification for ADIZ lies theoretically in the precautionary principle which asserts that the absence of empirical or scientific evidence should not preclude States from taking action to prevent a harm before it occurs.⁸

Since the first ADIZ was established by the United States in 1950, several coastal States have established their respective ADIZs.⁹ It has been generally recognised by the international community and, as a matter of fact, the establishment and operation of these ADIZs have not been strongly objected by most other States in the neighbouring area. More importantly, foreign aircrafts flying through these ADIZs do obey the regulations and rules stipulated by those States. Therefore, it can be reasonably concluded that the establishment and operation of an ADIZ by coastal States have reached the threshold of forming customary international law, with both concrete State practice and *opinio juris*.¹⁰

See R Abeyratne, 'In Search of Theoretical Justification for Air Defence Identification Zones' (2012) 5 Journal of Transportation Security 87.

⁴ See IL Head, 'ADIZ, International Law, and Contiguous Airspace' (1964) 3 Alberta Law Review 182, 183.

⁵ See *ibid* 184.

⁶ See Roach (n 3) para 5. It is worth mentioning that certain general principles of law may also play an important role in the contemporary legal regime of ADIZ.

⁷ The Convention was signed on 7 December 1944 and entered into force on 4 April 1947.

⁸ Abeyratne (n 3) 89.

⁹ See E Cuadra, 'Air Defense Identification Zones: Creeping Jurisdiction in the Airspace' (1977) 18 Virginia Journal of International Law 485, 492 and 509. See also Roach (n 3) para 5.

¹⁰ See 'The Commander's Handbook on the Law of Naval Operations' (NWP 1-14M, July 2007) section 2.7.2.3. See also Roach (n 3) para 5; Cuadra (n 9) 485.

Before assessing the issues related to the establishment of the Chinese ADIZ, it is necessary to briefly summarise the essential customary international law rules regarding the establishment and operation of an ADIZ. First and foremost, a coastal State is entitled to establish an ADIZ above its land territory and marine space (internal waters, territorial sea, EEZ) as well as above the high seas. For airspace outside the territorial airspace of that coastal State (the airspace above the EEZ and the high seas), no State sovereignty will be generated. Nor will any sovereign rights be accorded. And so, it is obvious that the nature of this portion of airspace remains as international airspace.¹¹ Secondly, with regard to the aircraft identification rules within the ADIZ, it is generally recognised that these rules shall only apply to aircraft that intend to enter into or depart from the territorial airspace of that coastal State.¹² The aircraft shall identify themselves as well as filing their flight plans and position reports to the authorities of that coastal State. For aircraft merely flying through the ADIZ, these rules are generally not applicable.¹³ Thirdly, in peacetime and non-emergency circumstances, civil aircraft which fail to comply with the aircraft identification rules may be intercepted but not attacked.¹⁴

ii. Reflections on the Issues regarding the Legitimacy of the Establishment of the Chinese ADIZ and the Chinese Aircraft Identification Rules

The establishment of the East China Sea Air Identification Zone (the Chinese ADIZ) has raised controversy over its legality soon after the official announcement of the establishment and the announcement of the aircraft identification rules.¹⁵ The major controversy seems to be focused on the following three issues. First of all, the Chinese ADIZ covers not only over the Chinese marine space (its territorial waters and the adjacent part of EEZ) but also overlaps with the disputed marine space with Japan and South Korea, especially the highly disputed Diaoyu Islands (Senkaku Islands).¹⁶ As a result, the Chinese ADIZ has overlapped with the Japanese and the South Korean ADIZ. Secondly, the aircraft identification rules issued by China infer that any aircraft entering its ADIZ shall abide by these rules.¹⁷ Such an implication means even for those aircraft flying through the ADIZ but not intending to enter the Chinese territorial airspace will also be subjected to the rules unilaterally set by China. Thirdly, according to the third point in the Chinese aircraft identification rules, the Chinese armed forces are authorised to adopt 'defensive emergency measures' to respond to aircraft that fail to comply with the aircraft identification rules.¹⁸ This point contains the slim possibility that foreign

¹¹ See Roach (n 3) para 1 and 2.

¹² See *ibid* para 6. See also the United States Air Traffic and General Operating Rules (14 CFR 2003 Part 99), especially section 99.1a which specify the applicability of the rules limited to aircrafts operating in the United States or into, within or out of the United State through its ADIZ.

¹³ See Roach (n 3) para 6.

¹⁴ See *ibid* para 7-9.

¹⁵ For instance, see 'Japan's PM Demands China Revoke Claim to Air Zone Over Disputed Islands' (*The Guardian*, 25 November 2013) <http://www.theguardian.com/world/2013/nov/25/japan-shinzo-abe-china-air-zone-disputed-islands> accessed 3 December 2013. See also 'Foreign Ministry Spokesperson Qin Gang's Regular Press Conference on November 29, 2013' (*Ministry of Foreign Affairs of the People's Republic of China*, 29 November 2013) Question 8 <http://www.fmprc.gov.cn/eng/xwfw/s2510/t1104103.shtml> accessed 3 December 2013.

¹⁶ See 'China establishes 'air-defence zone' over East China Sea' (*BBC News*, 23 November 2013) <http://www.bbc.co.uk/news/world-asia-25062525> accessed 3 December 2013.

¹⁷ See 'Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of the P.R.C.' (n 2).

¹⁸ See *ibid*.

aircraft might be intercepted or even shot down by Chinese armed forces should these aircraft fail voluntary identification.¹⁹ The following paragraphs will assess these three issues one by one.

With regard to the first issue, as it has been pointed out above, the establishment of an ADIZ over marine space adjacent to a coastal State has already been accepted as customary international law. Thus, the real issue lies in whether the establishment of an ADIZ covering disputed marine space with other States contravenes customary international law rules. Above all, it can be pointed out that there is no specific rule in customary international law which prohibits the establishment of an ADIZ over disputed marine space. On the contrary, State practice reveals that it is not unusual for State to unilaterally establish or extend an ADIZ over disputed marine space. For instance, the Japanese ADIZ extension in 2010 covered a portion of the marine space disputed by Taiwan.²⁰ In fact, the South Korea ADIZ also has overlapped with the Japanese ADIZ in disputed marine space. Moreover, after the Chinese announcement of the establishment of the East China Sea ADIZ, South Korea has recently expanded its own ADIZ to overlap with the Chinese and the Japanese ADIZ.²¹ Thus, it is evidently that the establishment of the Chinese ADIZ State practice does not contravene customary international law.

With regard to the second issue, it can be admitted that customary international law regarding the operation regulations and aircraft identification rules of the ADIZ normally only applies to foreign aircrafts that intend to enter the territorial airspace of the coastal State.²² The operation regulations and aircraft identification rules generally do not apply to foreign aircraft that merely fly through the ADIZ.²³ The typical example is the practice of the United States. According to the US operational rules for the ADIZ:

The United States does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace nor does the United States apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace.²⁴

However, it is worth noting that China is not the first nation that requires any foreign aircraft flies into the ADIZ shall obey the aircraft identification rules. In fact, the past Canadian rules for ADIZ require

¹⁹ See 'Japan Takes Airspace Issue to U.N. Agency' (*The New York Times*, 30 November 2013) <http://www.nytimes.com/2013/12/01/world/asia/japan-takes-airspace-issue-to-un-agency.html?src=un&feedurl=http%3A%2F%2Fjson8.nytimes.com%2Fpages%2Fworld%2Fasia%2Findex.jsonp> accessed 4 December 2013.

²⁰ See 'Ministry of Defense Extends the Air Defense Identification Zone, 26km West above Yonaguni Island' (*The Ryukyu Shimpō*, 25 June, 2010) <http://ryukyushimpo.jp/news/storyid-164039-storytopic-3.html> accessed 4 December 2013. See also 'Japan extends ADIZ into Taiwan space' (*Taipei Times*, 26 June 2010) <http://www.taipetimes.com/News/front/archives/2010/06/26/2003476438> accessed 4 December 2013.

²¹ See 'South Korea Declares Expanded ADIZ Overlapping with Other Zones' (*The Japan Times*, 8 December 2013) <http://www.japantimes.co.jp/news/2013/12/08/asia-pacific/south-korea-declares-expanded-adiz-overlapping-with-other-zones/#.UqXcx43xviU> accessed 9 December 2013. See also 'South Korea Expands Own ADIZ' (*Taipei Times*, 9 December 2013) <http://www.taipetimes.com/News/front/archives/2013/12/09/2003578604> accessed 9 December 2013; 'South Korea Expands Air Defense Zone Southward' (*Xinhua News*, 9 December 2013) http://news.xinhuanet.com/english/world/2013-12/08/c_132951349.htm accessed 9 December 2013.

²² See Roach (n 3) para 6.

²³ See *ibid.*

²⁴ 'The Commander's Handbook on the Law of Naval Operations' (n 10) section 2.7.2.3.

the same information not only from aircraft flying to Canada but as well from those which are flying elsewhere and which pass through the Zone en route.²⁵

Of particular importance is that the contemporary Canadian Aviation Regulations still adopt a similar provision.²⁶ Obviously, the Canadian practice has not been challenged by any other nations include the US. Considering the Canadian practice, it is unlikely that the Chinese rules should be seriously challenged by other States.

With regard to the issue of the adoption of emergency defensive measures should a foreign aircraft fail to comply with the aircraft identification rules, it is generally recognised in customary international law as well as the Chicago Convention that a civil aircraft can be intercepted by airforce but not be attacked upon.²⁷ Admittedly, the text of the third point of the aircraft identification rules of the Chinese ADIZ does not distinguish its application between civil and military aircraft. Nevertheless, it is rather inconceivable that a civil aircraft that fly into the ADIZ shall have any sensible reason not to 'cooperate in the identification or refuse to follow the instructions'. Besides, as it has been pointed out above, Article 3 *bis* of the Chicago Convention has set the protection of civilian aircrafts as a priority and required State parties to refrain from using force against civilian aircrafts. China has ratified Article 3 *bis* in July 1997, one year before Article 3 *bis* entered into force in October 1998.²⁸ Evidently, it is not correct to construe that the third point of the Chinese aircraft identification rules intends to authorise the Chinese airforce to use unnecessary force directly against foreign civilian aircrafts. With regard to foreign military aircrafts, the issue is quite different. As a matter of fact, neither customary international law nor the Chicago Convention proscribes the shooting down of a military aircraft that flies into an ADIZ.²⁹ On the contrary, it has been pointed out by Roach that 'in the case of imminent or actual hostilities, a State may find it necessary to take measures in self-defence that will affect overflight in international airspace'.³⁰ In customary international law, a State is not prohibited from shooting down an incoming military aircraft in international airspace. Thus, even considering the extreme circumstance, the third point of the Chinese aircraft identification rules does not contravene customary international law.³¹

²⁵ Head (n 4) 184. According to the Canadian Air Navigation Order (7 April 1961) section 11, 'No person shall operate an aircraft into or within a coastal CADIZ unless he has filed an IFR flight plan, a DVFR flight plan or a Defence flight notification with an appropriate air traffic control unit.' Obviously, this provision applies to any aircraft entering the Canadian ADIZ.

²⁶ See Canadian Aviation Regulations (SOR/96-433) section 602.145 (1).

²⁷ See Roach (n 3) para 7. See also Article 3*bis* of the Chicago Convention.

²⁸ See 'Protocol Relating to an Amendment to the Convention on International Civil Aviation, Article 3 bis, Status as of 27 January 2012' (ICAO) http://www.icao.int/secretariat/legal/List%20of%20Parties/3bis_EN.pdf accessed 9 December 2013.

²⁹ It should be noted that the Chicago Convention does not apply to military aircrafts. See Article 3 (a) and 3 (b) of the Chicago Convention.

³⁰ Roach (n 3) para 9.

³¹ Nevertheless, it is worth emphasizing that even in emergent circumstances, the so-called 'defensive emergency measures' should be adopted with great caution and the intercepting fighter should endeavour to avoid any unnecessary use of force. Here one infamous incident is worth mentioning: On 3 July 1988 the Iran Air Flight 655 was mistakenly identified by the US Navy cruiser *Vincennes* as a hostile jet fighter and consequently shot down by the cruiser. The incident resulted in the death of 290 passengers and crew. See 'US Warship Shoots Down Iranian Airliner' (*BBC News*, 3 July 1988) http://news.bbc.co.uk/onthisday/hi/dates/stories/july/3/newsid_4678000/4678707.stm accessed 9 December 2013.

Last but not least, it is well worth mentioning that since the announcement of the establishment of the Chinese ADIZ and the announcement of the Chinese aircraft identification rules, several States which had initially protested against the establishment of the Chinese ADIZ have instructed their commercial airlines to respect the Chinese ADIZ and comply with the Chinese aircraft identification rules.³² It is also reported that as of 5 December 2013, '55 airlines from 19 countries and 3 regions have reported their flight plans to China'.³³ Considering the sheer number of recognition of the Chinese ADIZ and the Chinese aircraft identification rules, their legality and acceptance by the international community are now of less doubt.

Conclusion

It can be recognised that in contemporary international law, the establishment and operation of ADIZs are regulated by customary international law. Under contemporary customary international law, a coastal State is entitled to unilaterally establish an ADIZ over marine space adjacent to its land territory. It can be seen from State practice that the establishment of an ADIZ covering disputed marine space is not prohibited by customary international law. Although the Chinese aircraft identification rules are not entirely in accord with State practice of other States, they are indeed not prohibited by customary international law. Furthermore, the increasing recognition and acceptance of the Chinese ADIZ and the Chinese aircraft identification rules also enhance their legality. Based on these points, it can be concluded that the recent establishment of the Chinese ADIZ and the announcement of the Chinese aircraft identification rules do not contravene customary international law. Its establishment and operation rules are well justified.

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³² For instance, see 'US Carriers Urged to Comply with China Air Zone Rules' (*BBC News*, 30 November 2013) <http://www.bbc.co.uk/news/world-asia-25165503> accessed 6 December 2013; 'Japanese Airlines Say They Will Obey China's Air Zone Rules Over Disputed Islands' (*South China Morning Post*, 6 December 2013) <http://www.scmp.com/news/china/article/1366082/japanese-airlines-say-they-will-obey-chinas-air-zone-rules-over-disputed> accessed 6 December 2013.

³³ See 'Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on December 5, 2013' (*Ministry of Foreign Affairs of the People's Republic of China*, 5 December 2013) <http://www.fmprc.gov.cn/eng/xwfw/s2510/t1106014.shtml> accessed 6 December 2013.